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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1971

No. [redacted] 70-342

GEORGE K. MacPHERSON,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the

Supreme Court of the United States

October Term, 1971

No.

GEORGE K. MacPHERSON,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on March 31,1971.

Opinion Below

There was no opinion in the United States District Court for the District of Massachusetts.

The opinion of the Court of Appeals for the First Circuit is annexed hereto as Appendix A.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on December 1, 1970 and is annexed hereto as Appendix B.

The judgment of the Court of Appeals for the First Circuit was entered on March 31, 1971 and is annexed hereto as Appendix C.

Jurisdiction

The judgment sought to be reviewed was entered on March 31, 1971 and is annexed hereto as Appendix C.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1).

Questions Presented

1. Was there any evidence that negligence of the respondent contributed to the accident?
2. Did the decision of the Court of Appeals invade the function of the jury?

Statute Involved

45 U.S.C. secs. 51 et seq.

Statement of the Case

This is an FELA action by a railroad employee to recover damages for personal injury sustained when he slipped and fell while attempting to climb over a pile of snow.

At the close of evidence at the trial in the District Court before a jury, respondent's motion for a directed verdict was denied; subsequently the jury returned a verdict for petitioner and judgment was entered for the petitioner by the District Court. (Appendix B)

The Court of Appeals entered judgment reversing the judgment of the District Court (Appendix C) and filed an opinion on the same day. (Appendix A)

This is a petition seeking review of the judgment of the Court of Appeals.

The evidence adduced at the trial may be summarized as follows:

Petitioner was employed as a conductor on a local freight run distributing and picking up cars on a single track line between Somerville and the Sylvania plant in Marblehead.

In proceeding east from Somerville to Sylvania the engine was at the front of the train pulling freight cars, with a caboose at the rear of the train. In proceeding west from Sylvania to Somerville the engine was at the rear of the train pushing freight cars, with a caboose now at the front of the train.

Between Somerville and Sylvania there were multiple public crossings at which pedestrians and motor vehicles crossed the track. There were various protection

devices provided by the respondent to control movement of the train and the public over the crossings, but at some of the crossings there were no protection devices at all.

At those unprotected crossings, when the train was proceeding east, with the engine at the front, and with the engineer who controlled movement of the engine and train having the better view of the crossing, there was a practice to stop "10, 15, 20 feet" back of the crossing and a brakeman riding in the engine would then get off and proceed to the crossing and control movements of the train and public over the crossing.

At those unprotected crossings when the train was proceeding west, with the engine at the rear and pushing freight cars, and with the caboose now at the front of the train, movement of the train was controlled by hand motions passed by the petitioner and a flagman from the rear platform of the caboose to the engineer.

Further, there was a practice when the train was being pushed west over unprotected crossings, with the engineer now at the rear of the train and control of the train approaching the public crossing depending on proper interpretation of hand signals given and received at varying distances, depending on the number of freight cars intervening between the engine and caboose, for the men on the rear platform of the caboose to stop the train 35 to 40 feet from the crossing and for the flagman to get off

the caboose, proceed to the crossing and control movements of the train and public over the crossing. The reason for this practice was to allow a margin of error in case the engineer did not respond to the motions (R.71).

On February 2, 1966 the work had been completed at Sylvania and the train was being pushed westerly by the engine toward the Loring Avenue crossing, an unprotected crossing. The engine was about 200 feet east of the caboose, which was at the front of the train.

It was a practice for the respondent to plow snow alongside the south side of the track from the Loring Avenue crossing easterly from the crossing for a distance of 50 feet, which would provide a walking way to the crossing (R.34) from the location where the train usually stopped (35 to 40 feet east of the crossing) when being pushed westerly.

There were four snowstorms in January, 1966. After the first three the respondent plowed the snow from the south side of the track and left a pile of snow about 50 feet east of the crossing, the usual location of the pile. After the fourth snowstorm the respondent plowed the south side of the track again and left a pile of snow closer to, and between the usual 50 foot location and the crossing.

There were about 12 to 15 feet between the usual 50 foot location and the closer pile. The width of the base of the closer pile was about 10 feet. <u>There</u>

were 10 to 12 feet between the nearest portion of the closer pile and the sidewalk line of Loring Avenue and another 10 to 12 feet to the pavement of the Loring Avenue crossing. In order to stop the caboose between the closer pile and the crossing so as to utilize the cleared walking way between these 2 locations, the caboose would have had to have been stopped within 10 to 12 feet of the pedestrian sidewalk.

This closer pile was about 2-1/2 to 3 feet high and had a hard, crusted and creviced surface.

The petitioner complained 5 days prior to the accident to a section foreman of the respondent that the closer pile was not pushed back far enough to give walking way but nothing was done.

The caboose and train stopped at the usual location which placed the caboose between the 2 piles, and placed the closer pile between the petitioner and the crossing. He alighted onto the walking way on the south side of the track, and as he attempted to go over the top of the closer pile, he twisted and fractured his left leg.

Petitioner could have stepped between the corner of the caboose and the closer pile onto the track and thus proceeded to the crossing, but this would have violated a rule of the respondent that provided that employees should not go on to tracks within 10 feet of cars in case they start suddenly.

Reasons for Granting the Writ

I. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court has set down the test for judicial appraisal of the proofs to determine whether a jury question is presented in Rogers v. Missouri Pacific Railroad Company 352 U.S. 500. In the present case it is difficult to determine whether the Court of Appeals reversed because, 1. there was no proof of negligence of the respondent, 2. there was no proof that negligence of the respondent contributed in whole or in part to the injuries of the petitioner, or 3. that petitioner's conduct was the sole cause of his injuries.

Evidence of the piling of snow on a walking way along a railroad track in an obstructive manner prior to the accident and the failure to remove the obstructing pile by respondent after complaint by the petitioner, also prior to the accident, is proof of negligence of respondent.

Violation of its own practice to pile snow beyond the walking way provided is proof of negligence of respondent.

Considering all the circumstances of the scene of the accident and the relationship between the duties of the petitioner to the respondent and petitioner's duty to the public users of the Loring Avenue crossing, there was proof of the respondent failed to use reasonable care to furnish the petitioner

with a safe place to work within the meaning of the test applied by this Court in Bailey v. Central Vermont Ry., 319 U.S. 350.

Evidence of the practice to plow snow along the south side of the track and to pile the snow 50 feet back from the crossing is recognition and notice of the practice to stop the caboose 35 to 40 feet from the crossing, and is proof of foreseeability by respondent that petitioner would stop the caboose at the usual location on the day of the accident.

If the Court of Appeals reversed because there was no proof of causal relation between negligence of the respondent and petitioner's injuries, then petitioner says the Court of Appeals failed to apply the limited appraisal of the proofs prescribed by Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500.

If the Court of Appeals reversed because it found as a matter of law that petitioner's conduct was the sole cause of his injuries, petitioner says that in this case, as in Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, the jury was instructed to return a verdict for the respondent if they found the sole cause for petitioner's injuries was his own negligence. It must be presumed the jury verdict was obedient to the trial judge's charge and that the jury found that petitioner's injuries resulted at least in part from negligence of the respondent.

With regard to the second question presented, petitioner says the Court of Appeals improperly invaded the function and province of the jury in this Federal Employers' Liability Act case as to the evidence and inferences to be drawn therefrom bearing on 1. proof of negligence of respondent and/or 2. proof as to causal relation between respondent's negligence and petitioner's injuries and/or 3. proof as to contributory negligence of petitioner. Petitioner says the principles set out in Gallick v. Baltimore and Ohio Railroad Company, 372 U.S. 108, support this contention.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Francis C. Newton, Jr.

Malone, McCarthy & Boluch
by Robert P. Malone
55 Union Street
Boston, Massachusetts
Attorneys for Petitioner

United States Court of Appeals
For the First Circuit

No. 7799.

GEORGE K. MacPHERSON,

PLAINTIFF, APPELLEE,

v.

BOSTON AND MAINE CORPORATION,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

John J. C. Herlihy for appellant.
Robert P. Malone for appellee.

March 31, 1971

ALDRICH, *Chief Judge*. This is an FELA suit, 45 U.S.C. §§ 51 *et seq.*, by MacPherson, a freight train conductor, against the Boston and Maine Corporation to recover damages for personal injury sustained when he slipped on a pile of snow. The sole question is whether the court erred in not directing a verdict for the defendant, which in turn raises the question whether there was any evidence that negligence of the defendant contributed to the accident. We recognize, of course, that this takes very little showing. *See Barboza* v. *Texaco, Inc.*, 1 Cir., 1970, 434 F.2d 121. Plaintiff's evidence was as follows.

Plaintiff was employed on a local freight run, distributing and picking up cars on a single track line between Boston and the North Shore. As conductor he was in charge

of the train. Whichever direction they were going, the engine would be at the east end, and the plaintiff, together with a flagman, would be in a caboose at the west end. On the day in question they were backing the train westerly towards the Loring Avenue crossing. This crossing was, like many others, unprotected by automatic signals. A company rule provided,

> "All moves over crossings must be stopped within 50 feet of the crossing and a member of the crew protect it."

This meant anywhere within the 50 feet. Plaintiff testified that when the train was proceeding forward and there was a crossing with an automatic signal it was customary to stop the engine at a stop post located a car length or about 40 feet from the crossing, and then to continue to within 20 feet of the crossing, when the automatic signal would be activated. Then, when the traffic had ceased on the crossing, the train would proceed. If, as at Loring Avenue, there was no automatic signal the engineer would proceed in the first instance to within "10, 15, 20 feet" of the crossing before stopping. A brakeman would then get off and protect the crossing.

When they were backing toward the Loring Avenue crossing the plaintiff would stand on the caboose rear platform with the flagman, who would be on the north side. The engineer would be on the north side of the cab. The plaintiff would direct the flagman. He, in turn, would give hand signals to the engineer indicating that they were three car lengths, then two, then one car length away from the stopping point, and then direct a stop, about 40 feet from the crossing. The flagman would get out and walk to the crossing.

On this day the crew was following its usual practice, which was not to cross Loring Avenue immediately, but to lock the train, walk to the crossing, and go to a restaurant.

The date was February. There had been four snowstorms. On the south side of the track, with which we are concerned, the railroad had plowed after the first three, and had left a pile of snow about 50 feet back from the crossing. After the fourth storm it had established a new pile, about 12 feet short of the first one. This pile ended 10 or 12 feet from the sidewalk, which in turn was 10 or 12 feet from the highway crossing. It was about 3 feet high, and had frozen. The week before, plaintiff had complained to a section foreman that this pile should not be there. Nothing had been done. Plaintiff caused the train to be stopped at the usual place, which placed the caboose platform between the two piles. He alighted on the south side and climbed over the second pile. In doing so he slipped and broke his leg.

The question is whether the defendant was negligent in leaving the second snow pile where it did. No specific attention was given at the trial as to the possible avoidability of doing so. We may wonder whether, once the first pile had been established, it would thereafter have been possible to have cleared the entire 40 feet back, since the two piles were only 12 feet apart. We will assume, however, in plaintiff's favor, that the jury could have found that this could have been managed. We will also assume in plaintiff's favor that he was excused from walking down the track itself, from which all snow had been removed.[1] However, we do not see why the defendant should have envisaged that the plaintiff would bring the train to a final stop at a point where he had to climb over the snow pile. While there was a safety custom of stopping 40 feet from the crossing, no rule, and no reason,

[1] A rule forbad walking on the track within 10 feet of a stopped train. The obvious purpose of such a rule was to guard against someone starting the train unexpectedly. Since in this case the engineer and fireman had also left the train, there could be no one aboard to start it.

have been suggested why plaintiff could not have started up again and brought the rear of the caboose to a stop in the space between the second snow pile and the crossing. The track was straight, and the engineer was accustomed to stopping on signal and spotting the rear end with precision.[2] Indeed, the only rules that were violated were rules violated by plaintiff himself. Defendant's safety rules instructed employees to be careful with respect to snow and ice, and to avoid obstructions where one could slip, trip or fall. Plaintiff well knew of this obstruction,[3] and having complete control as to which side of it the train should come to rest, there was no occasion for defendant to suppose that, for no purpose, he would walk over it instead of avoiding it. Having no reason to anticipate plaintiff's procedure, there was no negligence.

Reversed. Judgment for the defendant.

---

[2] Q. "[T]here is no question that you, as you told us here, once he did bring it to a stop, you could have told him to move it back as little as six inches or as many feet as you wanted, isn't that true?" A. "Right." Those of us with long memories, who have seen freight and passenger trains made up, could take judicial notice of the correctness of this concession that control of the train is elementary procedure.

[3] Plaintiff's cases, which deal with a duty to warn, and a right to rely upon the defendant's taking customary precautions, are in no way relevant when the alleged defect was obvious and the plaintiff had both prior and present knowledge of it.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

APPENDIX B

GEORGE K. MACPHERSON

V

CIVIL ACTION NO. 68-105

BOSTON & MAINE CORPORATION

J U D G M E N T

CAFFREY, D.J.
December 1, 1970

The above-entitled action having come on for trial by the Court and a jury, and after trial and in accordance with the verdict of the jury, it is

ORDERED:

Judgment for the plaintiff GEORGE K. MACPHERSON against the defendant BOSTON & MAINE CORPORATION in the sum of $17,500.00.

By the Court,

Deputy Clerk

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APPENDIX C

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 7799.

GEORGE E. MacKINNON,
Plaintiff, Appellee,

v.

BOSTON & MAINE CORPORATION,
Defendant, Appellant.

JUDGMENT

Entered March 31, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court with instructions to enter judgment for the defendant.

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By the Court:

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Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 70-342.

GEORGE K. MacPHERSON,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATUTE.

45 U.S.C. sections 51 et seq. 2 et seq.

Supreme Court of the United States.

October Term, 1971.

No. 70-342.

GEORGE K. MacPHERSON,
Petitioner,
v.
BOSTON AND MAINE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

There was no opinion in the United States District Court for the District of Massachusetts.

The opinion of the Court of Appeals for the First Circuit has been annexed to the petition.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

1. Was there any evidence of the negligence of the respondent which contributed to the happening of the accident?

Statutes Involved.

45 U.S.C. sections 51 *et seq.*

Statement of the Case.

This case is before the court on the petitioner's appeal from a judgment for the defendant entered by the Court of Appeals for the First Circuit on March 31, 1971, which reversed the judgment of a District Court entered as a result of a jury verdict for the plaintiff in the amount of $17,500.

This is a petition seeking a review of the judgment of the Court of Appeals. The evidence introduced at the trial may be summarized as follows:

At the time of the accident the plaintiff was a freight conductor on Train B21, B22. This train was a local freight, distributing cars between Boston and Salem. The plaintiff was in charge of the train. Between Somerville and the Sylvania plant there were a number of manual public crossings which had to be protected by a flagman or member of the crew. The Loring Avenue crossing was one of these and the practice there was for the engine to stop back clear of the crossing; the head brakeman would then get out with a flag, stop the traffic and give the train a signal to proceed. In order to proceed back from the Sylvania plant to Somerville, the train would be pushed with the caboose on the west end of the train. The train would back up until it got to Loring Avenue, within a car length, 35 to 40 feet, where it would be stopped. On the day of the accident, the train was heading back from the Sylvania plant and the plaintiff stopped the train at Loring Avenue about one car length back from Loring Avenue. The train was stopped so that the crew could go over to the Loring Avenue Diner for lunch. Plaintiff got off the caboose on the south side,

turned and climbed over a bank of snow. When he got to the top of the banking, his leg twisted and he fell down, sustaining the injuries complained of. Early in January there had been a couple of snow storms, also one in the third week of January. There was also a storm three or four days prior to the accident. Just east of the crossing, on both sides, there was a bank of snow about 50 feet from the crossing. There was another bank of snow about 10 or 12 feet from the crossing with about 6 inches of snow on the left. The distance in feet from the closer snow bank to the crossing was about 12 feet.

The snow pile that the plaintiff fell on was located at least 12 feet from the crossing. As the person in charge of the train, the plaintiff was the one who said where it was to stop and where it was to start up and go. On the day of the accident, the plaintiff was in the caboose on the back platform in the most forward part of the train moving toward the crossing. Two brakeman were on the platform with him. If they were not going to stop for coffee that morning and if they were going through the crossing, one of the brakemen, after the train was stopped, would have been sent up ahead to the crossing with a flag to stop traffic. The plaintiff would not have been one of these men because he was the conductor.

Although a rule was introduced into evidence requiring the train to stop within 50 feet of a crossing, the plaintiff could, if he wanted to after the train had stopped, signal the engineer to move the train ahead on to the public crossing, or he could have signaled the engineer to pull it off the public crossing. On the day of the accident the plaintiff was aware that there were two piles of snow in the area just to the left of the train.

When the plaintiff got off the caboose he took two or three steps until he got to the snow bank. If he had taken one step to his right, he would have been in the bed between the rails of the track.

When moving freight trains to the side of buildings, it is sometimes necessary to line up the doorway on the freight car with the doorway of the building. There was no question but that the plaintiff could have moved his train, once it stopped for this crossing, ahead another foot, six inches or ten feet. There was no limitation on the distance he could have moved the train ahead or back.

The following railroad rules were introduced into evidence:

Rules for the Government of the Operating Department of the Boston and Maine Railroad dated October 29, 1961.

> "Rule 103. When cars are being pushed by an engine and the conditions require, a trainman must take a conspicuous position on the leading car and when shifting over public crossings, the grades not protected by a watchman, by gates or crossing signals, in the operation a member of the crew must protect the cars."

Rules for the Government of the Operating Department for the Prevention of Personal Injuries—The Boston and Maine Railroad, dated July 11, 1963.

> "Rule S46. Employees must not cross tracks close to engine or cars. Always walk far enough away, at least 10 feet from engine or cars so that in case they start suddenly, there will be ample time in which to get off the track in safety.
>
> "Look for and avoid trains, engines or cars that may be approaching on the next track."

Timetable No. 12—Boston and Maine Corporation effective October 31, 1969.

> "All moves over crossings must be stopped within 50 feet of the crossing and a member of the crew to protect it."

Reasons for Denying the Writ of Certiorari.

The Court of Appeals has not decided a federal question in a way which is in conflict with applicable decisions of this Court.

The basis of liability under the Federal Employers' Liability Act is negligence which, in whole or in part, is the proximate cause of the plaintiff's injury. *Albertson* v. *Chicago and St. Paul Railway Company,* 242 Minn. 50, 64 N.W. 2d 175, 42 A.L.R. 2d 1044. An employer's liability is to be determined under the general rule which defines "negligence" as lack of due care under the circumstances or failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. *Sheaf* v. *Minneapolis, St. Paul & S.S.M.R. Co.,* 162 F. 2d 110. A Federal Employers' Liability Act plaintiff cannot carry his burden of proof without evidence that the negligence of the defendant was real. There has been no departure from the familiar and normal requirements of federal jurisprudence that the party with the burden of proof must present facts from which negligence and the causal relationship could be reasonably inferred. *Dessi* v. *Pennsylvania Railroad Co.* (1958, C.A. 3, Pennsylvania), 251 F. 2d 149; cert. den. 356 U.S. 967, 2 L. Ed. 2d 1073, 78 S. Ct. 1006. It seems perfectly clear that, considering all of the evidence in this case, the mere presence of snow piles in the vicinity of the crossing is not evidence of the defendant's negligence. It is hardly necessary to point out that heavy accumulations of snow must be plowed in the vicinity of railroad crossings such as the one in question and that the plowing of snow creates piles. To eliminate such snow piles from the vicinity of the tracks it would be necessary to plow the roadbed parallel to the tracks and such a requirement is clearly unreasonable. It is submitted that what is reasonable was

done in this case. The snow was plowed from the street crossing and back along the tracks for a distance of about 12 feet (Tr. 30). How far back from the crossing should the snow have been pushed when it is clear that trains using the crossing could be stopped anywhere the conductor required? Similarly there was no evidence showing that it was practical or possible to move the snow any farther back from the tracks in the place where the accident occurred. Exhibits 2 and 4 clearly show a substantial retaining wall in back of the snow piles which would clearly limit the amount of snow that could be pushed in that direction. What the exhibits also show is a reasonable clearing of the snow from the area of the crossing which would permit both the use of the crossing and obstruction-free access to the crossing by employees of the defendant entering and leaving trains stopped at the crossing. It is submitted that the defendant could not reasonably have foreseen that a snow pile 12 feet back from the crossing, and situated as the snow pile in question was situated, would be hazard in view of the fact that it was admittedly possible to stop the trains in front rather than behind the snow pile (Tr. 30), and because an easy, clearly defined, access route to the crossing existed which would have permitted the plaintiff to avoid the snow pile (Tr. 55).

It is apparent, both from the exhibits and from the plaintiff's testimony (Tr. 55), that he had a clear, unobstructed path to the crossing. It has been held that where an employee leaves a safe route which has been provided by his employer as a means of ingress and egress for his employees, and, instead, chooses a dangerous one and is injured while traveling thereon, he is not within the protection of the Federal Employers' Liability Act. *Hoyer* v. *Central Railroad Co. of New Jersey* (1918, C.A. 2, New York), 255 Fed. 493; *Krysiak* v. *Pennsylvania Railroad Co.* (1921, C.A. 3, New Jersey), 270 Fed. 758.

It is submitted that there was no evidence of the defendant's negligence for the further reason that the snow pile upon which the plaintiff fell was not the cause of the plaintiff's accident. The landmark case on causation is *Rogers* v. *Missouri Pacific Railroad Co.* (1957), 352 U.S. 500, 509, 1 L. Ed. 2d 493, 77 S. Ct. 443; reh. den. 353 U.S. 943, 1 L. Ed. 2d 764, 77 S. Ct. 808. In that case, a railway employee sought recovery under the Federal Employers' Liability Act for injuries sustained by him while he was engaged in burning leaves from a railway right-of-way with a hand torch. Upon noting the approach of a train the employee left the tracks to a point near a culvert, in compliance with his employer's orders, to observe the passing train; the passing train fanned the flames from the burning leaves which caused the fire to spread and the employee, in retreating from the place in which he was standing in order to avoid the flames, fell from the top of the culvert. The United States Supreme Court, expressing the view of five members, reversed a decision of a Supreme Court of Missouri that the employee's evidence did not support a finding of employer liability. In connection with the question of proximate cause the United States Supreme Court pointed out that the test under the Federal Employers' Liability Act is simply whether the proofs justify, with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. In applying the rule of the *Rogers* case, the courts, nonetheless, clearly indicate that there must still be a judicial appraisal as to the sufficiency of evidence to support a jury verdict. *Shea* v. *New York, New Haven & Hartford Railroad Co.*, 316 F. 2d 838.

It is, therefore, true that the *Rogers* rule still permits a court in a Federal Employers' Liabiiity Act action to deny causation as a matter of law where the proofs do not justify with reason the conclusion that employer negligence

played any part, even the slightest, in producing the injury or death of the railroad employee. This principle is illustrated in the case of *Inman* v. *Baltimore & Ohio Railroad Co.* (1959), 361 U.S. 138, 4 L. Ed. 2d 198, 80 S. Ct. 242, in which the evidence showed that the plaintiff, a nighttime crossing watchman stationed at defendant's railway intersection, was injured about midnight when an automobile driven by an intoxicated person ran into him from behind while he was flagging traffic for a passing train. A judgment on the verdict in plaintiff's favor was reversed by the Court of Appeals of Ohio and the Supreme Court of Ohio dismissed plaintiff's appeal. The United States Supreme Court affirmed on the ground that the evidence justified the conclusion that negligence on the part of the employer could have played no part in plaintiff's injury. This was in spite of the argument adopted by the dissenting judges that the jury might have found that the railroad was negligent in not assigning a part of the plaintiff's duties to someone else or not installing mechanical devices to stop traffic.

In *New York, New Haven & Hartford Railroad Co.* v. *Henagan* (1959, C.A. 1, Mass.), 272 F. 2d 153, rev. 364 U.S. 441, 5 L. Ed. 2d 183, 81 S. Ct. 198, the Supreme Court reversed a decision of this court where the evidence showed that the plaintiff, a waitress in the grill car of one of the defendant's trains, sued for injuries allegedly sustained when an emergency application of the brakes brought the train to a sudden stop. The engineer made the emergency application of the brakes in an unsuccessful effort to stop the train before it reached one who stepped off the tracks of the station in an attempt to commit suicide. This court affirmed a judgment on the verdict of the plaintiff stating that in recent years the Supreme Court allowed juries great latitude in deciding what may or may not be a reasonable conclusion to draw from the evidence in Federal Employers' Liability Act cases, citing the *Rogers* case for the proposi-

tion that only the barest possibility of causation is enough to make out a case for the jury. The Supreme Court, however, reversed the verdict holding that the proofs were insufficient to submit to the jury the question of whether the employer played a part in the emergency application of the brakes which allegedly produced plaintiff's injury.

In reliance on the *Rogers* rule, a judgment for defendant, notwithstanding the verdict for the plaintiff, was rendered in *Rubley* v. *Louisville & Nashville Railroad Company* (1962, D.C. Tennessee), 208 F. Supp. 798, a Federal Employers' Liability Act action in which the plaintiff claimed that the place where he worked was unsafe and that the railroad was negligent in failing to inaugurate a conservation sound program in failing to ascertain that the plaintiff's hearing was being affected by prolonged noise from the engines and to furnish him with earplugs.

A judgment for defendant, notwithstanding the verdict for the plaintiff, was also affirmed in *Dessi* v. *Pennsylvania Railroad Co.* (1958, C.A. 3, Pennsylvania), 251 F. 2d 149; cert. den. 356 U.S. 967, 2 L. Ed. 2d 1073, 78 S. Ct. 1006. In that case the plaintiff was rendered unconscious just after he had jacked up one corner of a railway car. Neither he nor his helper nor anyone else saw or knew just what happened. It was the plaintiff's theory that one of the possibilities under the evidence was that the handle of the jack suddenly moved in such a way as to strike the plaintiff and knock him unconscious. Recognizing the *Rogers* rule the court pointed out that under that rule the role of defendant's negligence in helping to bring about the injury may be small, but that the rule does not suggest that a Federal Employers' Liability Act plaintiff can carry his burden of proof without evidence that the negligence of the defendant was real; that the repeated use of the phrase "was reasonable" in the *Rogers* rule is a persuasive indication that the Supreme Court intended no departure

from the familiar and normal requirements of federal jurisprudence that the party with the burden of proof must present facts from which negligence and the causal relationship could reasonably be inferred.

Thus, the railroad's negligence was held too far removed, both in space and time, from the employee's injury to meet the causation requirements of the Federal Employers' Liability Act in *Nicholson* v. *Erie Railroad Company,* (1958, C.A. 2d, New York), 253 F. 2d 939, where it appeared that the plaintiff's post of duty was in New Jersey and that she lived in New York. She was accustomed to travel back and forth on the defendant's train, using the Jersey City station; she was the only woman employee in the shops and there was no women's toilet so she was accustomed to use the lavatory in any one of the cars standing on tracks adjoining the shop awaiting use; on the day of the accident she would have taken the bus to the station from which the train would leave except that she wanted to use the toilet and so she went into the yard; the foreman of the yard brought her to an empty train which was going right down to the station; she used the lavatory in the train; by the time she came out the train had started and reached the station and passengers were jumping on while it was going; she waited until the train stopped and was injured by being struck with something like a suitcase which a passenger was carrying. The theory was that because of defendant's failure to afford her toilet facilities she was forced to and did use for that purpose the lavatory in the car in which she was injured. A judgment dismissing her complaint for failure to state a cause of action under the act was affirmed on appeal. The court pointed out that, even if there was evidence sufficient to take the question of negligence to the jury, still the court below was correct in dismissing at the close of the evidence since the causation requisite for recovery under the act was lacking. The court stated that to impose liability on the defendant, the negli-

gence need not be the proximate cause of the injury; that the act has its own rule of causation, and that the injury need only be one resulting in whole or in part from the negligence of the employer and that under the *Rogers* rule the question of causation is one for the jury if the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury. The court also recognized that in speaking literally it could not be denied that defendant's failure to supply toilet facilities played a part in producing plaintiff's injury. However, the court pointed out that it is not enough that the injury would have happened but for the negligence of the defendant since there must be some causal connection.

See also *Simpson* v. *Texas & New Orleans Railroad Co.* (1962, C.A. 5, La.), 297 F. 2d 660, where the District Court's dismissal of a complaint filed by a railroad employee was affirmed.

The decision in this case by the Circuit Court of Appeals clearly recognizes the issues involved, and the decision itself logically follows the principles enunciated in the prior decisions of the United States Supreme Court and the Circuit Court itself.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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